HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 935 of 2001
(Old No. 1099 of 1999)

Ghananand @ Ghan Shyam Mishra …….Appellant
Vs.
State of U.P. ……..Respondent

Sri Pankaj Purohit learned counsel for the appellant.
Sri G.S. Sandhu learned A.G.A.

Hon'ble Irshad Hussain, J.

This criminal appeal was filed against the judgment and order dated 24.3.1999 passed by the Sessions Judge, Chamoli in S.T. No. 20/1997 convicting the appellant under section 304-A IPC and directing the appellant to furnish personal surety and two sureties of Rs. 5000/- each and to be of good character for the period of two years.

The appellant since deceased an application under section 394 of the Code of Criminal Procedure (for short 'Code') was preferred for leave to continue the appeal. Section 394 of the Code reads as under:-

> "***394. Abatement of appeals*** *- (1) Every appeal under Section 377 or Section 378 shall finally abate on the death of the accused.*
>
> *(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:*
>
> *Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.*
>
> *Explanation - In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister."*

It is evident that the appeal was filed against the said judgment, whereby the appellant was released on probation and no sentence of imprisonment was passed. In view of the proviso to the above section

aforesaid, the near relative of the deceased-appellant cannot be accorded leave to continue the appeal which in the peculiar circumstances of the case finally abate on the death of the appellant as provided under sub-section (2) of the section 394 of the Code. Therefore, the application to continue the appeal is not legally maintainable.

However, it is of significance that the appellant was a Government servant and was employed in Animal Husbandry Department and he died in harness. In the case of the appellant, the Government did not resort to the proviso 2(a) of the Article 311 of the Constitution of India and he was neither dismissed nor removed from the service on the ground of conviction on a criminal charge. This was perhaps on account of the fact that the charge under section 304-A of the IPC under which the appellant was convicted do not relate to the misconduct of such magnitude as would have deserved the penalty of dismissal or removal. Inspite of this, the learned counsel for the appellant pointed out that the benefits of the provisions of Dying in Harness Rules have not been extended to the appellant's son and further that retrial benefits have not been given to the family of the deceased-appellant. It appear that the decision by the State/Department was not taken on account of pendency of this appeal against conviction and in all probability considering the peculiar circumstances of the case and in view of the appeal finally abate on the death of the appellant, the authorities will consider the prayer of the applicant to give benefit of the provision of Dying in Harness Rule and to further provide the retrial benefits to the family of the appellant at the earliest.

In view of above, the appeal stand finally abated on the death of the appellant-Ghananand alias Ghan Shyam Mishra under sub-section (2) of the section 394 of the Code.

Dated 21.4.2004 **(Irshad Hussain, J.)**

Rawat